IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 405

JOSEPH M. TAUSSIG,

Petitioner,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO AS FORMER TRUSTEE UNDER ITS TRUST NO. 4954,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable Justices of the Supreme Court of the United States:

A small portion only of Respondent's Brief in opposition in this cause is addressed to the propositions urged in the Petition for a Writ of Certiorari:

I.

JURISDICTION IS DETERMINED BY THE STATE OF THINGS AT THE TIME SUIT IS FILED.

Leo Taussig, an Indispensable Party Plaintiff on Whose Behalf the Suit Was Filed, Was a Citizen of Illinois. Joseph M. Taussig, Petitioner and Defendant, Was a Citizen of Illinois.

The basic fallacy in Respondent's position is exemplified by Respondent's statement (Brief, p. 8): "The residence of Leo Taussig was immaterial so long as he was not found to be a citizen of New York." Of course as this Court expressly decided in *Indianapolis v. Chase National Bank*, 314 U. S. 63, 68, 69, it was the duty of the Courts below to "look beyond the pleadings and arrange the parties according to their sides in the dispute."

Moreover, it is axiomatic that diversity of citizenship depends upon the state of things at the time the suit was brought (*Mollan v. Torrance*, 9 Wheat. 537, 539, 6 U. S. 172, 173, *M. C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 382).

Leo Taussig was the real indispensable party in interest at the time the *Saxelby* suit was brought (Tr. 23, 24, App. 61). The suit was brought on his behalf (Tr. 60). He was at all times a citizen of Illinois and so found by the court (Tr. 200). Defendant and present Petitioner, Joseph M. Taussig, was also a citizen of Illinois and so found by the court (Tr. 168). Leo Taussig's subsequent death and belated dismissal as a party, is and was of no significance whatsoever in the determination of the District Court's federal jurisdiction over the suit.

II.

NEITHER RESPONDENT AMERICAN NATIONAL, NOR CHICAGO TITLE AND TRUST COMPANY WERE PARTIES TO ANY POST-DECREE AGREEMENTS; THE REMAINING PARTIES BELOW HAVE NO INTEREST WHATSOEVER IN THE STATE COURT RIGHTS HERE SOUGHT TO BE PRESERVED.

Respondent, American National Bank and Trust Company of Chicago as Trustee, hereafter referred to as American National, has not met the real issue in this case. By the Illinois state court proceeding, enjoined below, petitioner sought to litigate, and only to litigate his contract rights against American National, arising as a result of American National's failure and refusal to comply with petitioner's timely demand that it, as petitioner's trustee appeal from the decree of June 4, 1947, and also that it notify Chicago Title and Trust Company so to do (App. 160). American National did not appeal. Instead, without awaiting the expiration of the automatic ten-day stay of execution (Rule 62a F. R. C. P.) it conveyed the Drexel property to the successor trustee, without directions from petitioner as its beneficiary and forthwith resigned its trust (App. 151, 160).

None of the remaining appellees in the court below has any interest whatsoever in the pending litigation between petitioner and American National, his former trustee. Petitioner has not now, nor has he ever sought to abrogate his financial obligations to these parties, arising as a result of his agreement not to appeal, entered into after American National had made its premature and unauthorized conveyance (App. 126, 147). On the contrary, he has repeatedly asserted his intention to prosecute his contract rights against American National and Chicago Title and Trust Company only (App. 126, 147).

Neither American National or Chicago Title was a party to any of the subsequent stipulations or agreements in the cause.

No considerations of estoppel are present as to Respondent, American National and Chicago Title and Trust Company. Not only were these parties at all times aware of Petitioner's serious objections to the jurisdiction of the court below, but American National had itself raised similar jurisdictional objections (Tr. 38, 42, 51, 58, 59). It is only with respect to these parties that petitioner deems himself entitled to relief upon his Motion under Rule 60b F. R. C. P. In these proceedings, petitioner again ratified his undertakings with the parties to the stipulation (App. 126, 147).

Neither *Ex Parte Taussig*, No. 9586, Tr. 333-337, *Taussig* v. *Barnes*, 335 U. S. 829, or *Taussig* v. *Chicago Title*, 171 F. 2d 553 (Brief, p. 2) are of significance here. *Ex Parte Taussig* was a mandamus proceeding involving a discretionary writ. *Taussig* v. *Chicago Title*, was a proceeding upon a guaranty policy in which the result was predicated upon the non-appealed from Decree of June 4, 1947. No question of jurisdiction was determined in any of these cases.

Respondent's characterization (Brief, p. 3) that petitioner "had secretly acquired for his own benefit" the Drexel property, is hardly correct. The petition filed of record in the Probate Court of Cook County upon which the sale was approved, disclosed that petitioner was to repurchase the title in his individual capacity (Tr. 116). Ironically, present counsel for respondent American National represented petitioner in those proceedings in the Probate Court of Cook County, Illinois (Tr. 280, 303) (Printed Nos. 239, 262). The sale in question was at

issue between Ruth Saxelby and petitioner, in the Probate Court at the time *Saxelby* v. *Taussig* was instituted in the court below (Tr. 143, 144) (Printed Nos. 102, 103).

III.

THERE HAS BEEN NO PRIOR ADJUDICATION OPERATIVE AS A BAR TO PETITIONER'S CONTRACT RIGHTS AGAINST AMERICAN NATIONAL.

Respondent relies upon *Fidelity Casualty Co. of N. Y.* v. *Federal Express*, 136 F. 2d 35, 39 (Brief, p. 10). That case was an action for indemnity brought by one joint tort feasor defendant against another. Significantly, immediately after the statement quoted by respondent (Brief, p. 10) the Court of Appeals for the Second Circuit, quoting from *Wright* v. *Schick*, 134 Ohio St. 193, said (136 F. 2d at p. 39):

> "'It is universally recognized that a former judgment in order to be *res judicata* in a subsequent action must have been rendered in an action in which the parties to the subsequent action were adverse parties. The character of a party, as adverse or otherwise is to be determined not by his position on the docket, or in the title of the cause, but by reference to his relations to the other parties, as shown by his interests involved in the case. * * *'"

Here, the actions complained of by petitioner took place *after* the entry of the decree of June 4, 1947. Obviously that decree could not be controlling with respect to litigation arising from these subsequent acts.

CONCLUSION.

It is respectfully submitted that a Writ of Certiorari should issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered April 2, 1958, and that upon such review, said Court's judgment in Cause 12137 should be reversed with directions to remand the cause to the United States District Court for the Northern District of Illinois with directions to vacate the permanent and mandatory injunctions appealed from, and with respect to that Court's judgment in Cause 12138, that said judgment be reversed with directions to remand the cause to the United States District Court for the Northern District of Illinois, with directions to grant Petitoner's motion to vacate its decree of June 4, 1947, and all subsequent decrees with respect to Respondent, American National Bank and Trust Company of Chicago, and after hearing, that said Court enter such order as may be just under the circumstances with respect to the remaining parties to said decree.

Respectfully submitted,

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